STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 2, 2007
v	No. 269915 Wayne Circuit Court
CLEO POINDEXTER, Defendant-Appellant.	LC No. 05-009457-01

Before: Schuette, P.J., and Hoekstra and Meter, JJ.

PER CURIAM.

Defendant was convicted of four counts of assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to 10 ½ to 18 years' imprisonment for each assault with intent to murder conviction and to two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right, raising three issues for our review. We affirm.

I. FACTS

This case arises out of a shooting that occurred at the Chicago Blues Lounge (Lounge) in Detroit, Michigan on August 1, 2005. Micah Wilson, Calvin Scott, Deshawn Cheatom, Latasha Peterson, and Brittany Peterson went to the Lounge to attend a party for high school kids. As they approached the Lounge, defendant was outside rapping and waiving money. Cheatom testified that he approached defendant and asked him if he was responsible for "shooting up" his house. Defendant responded that he was not, and Cheatom backed away and suggested to the others that they leave because he had noticed a gun in defendant's pocket. He stated that as the group turned to leave, defendant pulled out the gun and fired four to five shots. Scott testified that he was shot in the upper back. He did not see defendant with a gun, and he did not see who shot him. Wilson was shot in the stomach and identified defendant as the shooter.

Terrance Turner was working security at the Lounge when the shooting occurred. Turner and his cousin left the Lounge to purchase cases of water for the bar. As they exited the Lounge, Turner testified that he saw defendant fire several shots in his direction into a group of people. He stated that he was 10 to 15 feet away from defendant at the time of the shooting.

Derrius Dixson testified for the defense. Dixson testified that he was defendant's friend. He stated that he was sitting in his car on the corner next to the Lounge when he heard six shots

fired. He never saw defendant at the Lounge. Dixson stated that he saw Wilson and Cheatom and a "gang of other guys" verbally confronting one another. He explained that Wilson and Cheatom were members of the Brightmoor Killers gang and the other group was composed of members from the Seven Mile gang. Dixson explained that the two groups continued to verbally spar until Wilson lifted up his shirt like he was going for a gun, and in retaliation, an individual from the Seven Mile group drew a gun and started firing.

Defendant attempted to call Sergeant Dunbeck to testify as to his efforts in procuring Latasha Peterson and Brittany Peterson as witnesses, but the court instructed him to call another witness because Dunbeck was unavailable. As the officer standing in for Sergeant Dunbeck, Detroit Police Sergeant David Levalley testified that he failed to serve the Peterson girls because he was unable to locate them. He had no addresses for them, and Wilson and Scott told him that they had moved away and were unable to contact them. Additionally, Sergeant Levalley was unable to look up their driver's license information because he did not have their birth dates. He also stated that he was unsure what additional information Sergeant Dunbeck may have had concerning the witnesses. But as the officer-in-charge, Dunbeck was responsible for locating and serving the witnesses.

Defendant was convicted of assault with intent to murder Wilson, Cheatom, Scott, and Turner. He was acquitted of the charges related to the shooting of Brittany and Latasha Peterson. He now appeals.

II. ADJOURNMENT OF TRIAL

First, defendant argues that the trial court abused its discretion by not adjourning the proceedings so that Sergeant Dunbeck could testify regarding whether he exercised due diligence in his efforts to produce endorsed res gestae witnesses Brittany Peterson and Latasha Peterson. We disagree.

A. Standard of Review

This Court reviews a trial court's decision to grant or deny an adjournment for an abuse of discretion. *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000).

B. Analysis

A party must show good cause to invoke a trial court's discretion to grant an adjournment. MCR 2.503(B)(1); see also *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002). Under MCR 2.503(C)(2), "An adjournment may be granted on the ground of unavailability of a witness or evidence only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence." Further, even if the trial court abused its discretion by denying an adjournment request, reversal is not required unless the defendant demonstrates that prejudice resulted from the abuse of discretion. *People v Coy*, 258 Mich App 1, 18-19; 669 NW2d 831 (2003).

The crux of defendant's argument to the trial court was that Dunbeck could possibly testify about the substance of the missing witnesses' testimony.[1] However, defendant was unsure if Dunbeck's testimony would benefit him. The prosecutor noted that there were no interview notes from those witnesses in the police file. Consequently, the trial court determined that Dunbeck's testimony regarding what Brittany and Latasha may have told Dunbeck would be hearsay, and therefore, would be inadmissible. See *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006) (hearsay evidence is generally inadmissible). Accordingly, we conclude that the trial court did not abuse its discretion by denying defendant's adjournment request.

III. PROSECUTOR'S DUE DILIGENCE

Second, defendant argues that the trial court erred by not requiring the prosecution to show due diligence in its efforts to produce Brittany and Latasha. Again, we disagree.

A. Standard of Review

Defendant did not preserve his claim by moving for a due-diligence hearing or a new trial. *People v Dixon*, 217 Mich App 400, 409; 552 NW2d 663 (1996). This Court reviews an unpreserved claim for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 764-765, 774; 597 NW2d 130 (1999). Reversal is warranted only "when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id*. at 774.

B. Analysis

The prosecution is obligated to exercise due diligence to produce endorsed witnesses at trial. *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004). The test for due diligence is "whether good-faith efforts were made to procure the testimony of the witness, not whether increased efforts would have produced it." *People v Watkins*, 209 Mich App 1, 4; 530 NW2d 111 (1995). If a trial court determines that the prosecution did not exercise due diligence in producing an endorsed witness, then the jury should be instructed with CJI2d 5.12, so "that it may infer that the missing witness's testimony would have been unfavorable to the prosecution's case." *Eccles*, *supra* at 388.

On appeal, defendant does not argue whether the prosecutor exercised due diligence, but rather, states that the trial record is inadequate to determine due diligence. However, defendant did not request a due-diligence hearing after finding out that Dunbeck was unavailable, and he did not complain that the prosecution failed to exercise due diligence after Sergeant David Levalley testified regarding the effort he made to find the two witnesses. Additionally, on two separate occasions the trial court assumed that due diligence was exercised, and defendant did not object or question the trial court regarding that assumption.

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[1] To the extent that defendant argues that the denial of an adjournment was error because it prevented him from determining whether due diligence was exercised by the prosecution to find Brittany and Latasha, defendant's remedy was to request a due diligence hearing. *People v Dixon*, 217 Mich App 400, 409; 552 NW2d 663 (1996).

We conclude that defendant has not shown plain error affecting his substantial rights because he has presented no authority for the proposition that the trial court was required to sua sponte hold a due-diligence hearing. See *People v Kevorkian*, 248 Mich App 373, 388-389; 639 NW2d 291 (2001) (a defendant may forfeit his claim by failing to provide authority and analysis on appeal). Rather, defendant only argues that the prosecutor breached his duty to produce Brittany and Latasha, thereby denying him due process. We note that the prosecutor could only breach his duty if he failed to exercise due diligence to find Brittany and Latasha, and defendant admits that the record is inadequate to determine if the prosecutor was duly diligent.

But even if there were plain error, defendant cannot show that his substantial rights were affected by the failure of Brittany and Latasha to testify. Defendant has not presented affidavits of the witnesses' proposed testimony or made any offer of proof other than defense counsel making speculative statements regarding his knowledge of the witnesses' proposed testimony. See *People v Pickens*, 446 Mich 298, 327; 521 NW2d 797 (1994) (defendant cannot establish reasonable probability that testimony would have undermined the confidence in the outcome of the trial where he fails to present evidence of favorable testimony).

IV. EFFECTIVE ASSISTANCE OF COUNSEL

Finally, we reject defendant's argument that he was denied the effective assistance of counsel where his counsel failed to demand the witnesses' production, failed to demand a due-diligence hearing, failed to seek assistance with locating the witnesses, and failed to request a missing-witness jury instruction.

A. Standard of Review

When reviewing an unpreserved claim of ineffective assistance of counsel, this Court's "review is limited to mistakes apparent on the record." *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

B. Analysis

To establish ineffective assistance of counsel, a defendant must show that counsel's performance "fell below an objective standard of reasonableness" under prevailing professional norms, and that this performance was so prejudicial that it denied the defendant a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). A defendant must overcome the strong presumption that his counsel was effective and engaged in sound trial strategy. *Id*.; *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). A defendant must show a reasonable probability that, but for counsel's error, the outcome would have been different. *Toma*, *supra* at 302-303.

Defendant first argues that counsel should have requested a hearing under *People v Pearson*, 404 Mich 698, 721; 273 NW2d 856 (1979), superseded by statute *People v Cook*, 266 Mich App 290; 702 NW2d 613 (2005), where the trial court could have ordered the prosecution to produce the witnesses or to assist defendant in finding them. However, the *Pearson* hearing defendant refers to was based on the preamendment version of MCL 767.40a, where the

prosecution was required to produce res gestae witnesses. See *Cook*, *supra* at 294-295. Under the postamendment statute, the prosecutor is only obligated to notify a defendant of all res gestae witnesses known to the prosecution and to provide defendant a list of witnesses that the prosecution intends to call at trial. *Id*.; see also MCL 767.40a(1) and (3). This Court held in *Cook* that *Pearson* hearings are no longer required since the statute no longer requires the prosecution to produce res gestae witnesses. *Cook*, *supra* at 295-296. Thus, counsel was not ineffective for failing to move for a *Pearson* hearing.

Further, defense counsel did not err in failing to call Brittany and Latasha Peterson. The failure to call supporting witnesses can constitute ineffective assistance of counsel where the missing witness's testimony could have changed the outcome of the case or, in other words, where a defendant is deprived of a substantial defense. *People v Bass*, 247 Mich App 385, 392; 636 NW2d 781 (2001). However, defense counsel did not fail to call Brittany and Latasha. Rather, the witnesses were endorsed witnesses, and therefore, the prosecution presumably intended to produce them. MCL 767.40a(3). Under MCL 767.40a(4), the prosecution can only strike a witness from its endorsed list by showing good cause. Thus, requiring defense counsel to produce witnesses on the prosecution's endorsed witness list is illogical, and counsel is not required to advocate meritless positions. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Defendant also argues that his trial counsel was ineffective for failing to seek assistance with locating the witnesses. Under MCL 767.40a(5), the prosecution is obligated to provide reasonable assistance to the defense to locate witnesses the defense requests. *People v Long*, 246 Mich App 582, 585-586; 633 NW2d 843 (2001). Here, the missing witnesses were not on defendant's witness list. However, they were endorsed on the prosecution's witness list. Therefore, defendant could presume that the prosecution intended to produce Brittany and Latasha. MCL 767.40a(3). In addition, defense counsel heard the prosecutor state at a pretrial motion hearing that he was having difficulty locating the two witnesses. The prosecutor's statement implies that efforts were being made to locate Brittany and Latasha. Thus, defense counsel's performance was not deficient.

Defendant contends that his trial counsel was ineffective for not more firmly demanding an adjournment so that he could elicit Dunbeck's testimony. Defense counsel first argued with the trial court regarding the importance of Dunbeck's testimony and then attempted to call Dunbeck as a witness. Defense counsel complained to the trial court that Dunbeck, who was returning in two days, should be produced so he could testify regarding the effort that was made to locate Brittany and Latasha. We find that defense counsel's efforts to have the trial adjourned were not deficient.

Defendant next claims that he was denied the effective assistance of counsel when his counsel failed to request a missing-witness jury instruction, CJI2d 5.12. Defendant asserts that the trial court would have determined that the witnesses' absence at trial was prejudicial to defendant, and therefore, defendant would have been entitled to a jury instruction stating that it could infer that the missing witnesses' testimony would have been unfavorable to the prosecution. However, a missing-witness jury instruction is appropriate upon a court's determination that the prosecution failed to exercise due diligence. *Eccles*, *supra* at 388. Here, the trial court did not make a due-diligence determination. Therefore, an instruction was not warranted.

Finally, defendant contends that his trial counsel was ineffective for failing to demand a due-diligence hearing. While defense counsel did not specifically request a hearing, he did raise the issue of the missing witnesses and he complained about Dunbeck's failure to appear. However, upon hearing Levalley's testimony about the efforts that he made to locate and serve subpoenas on Brittany and Latasha, defense counsel should have requested a due-diligence hearing as part of a sound trial strategy.

Regardless of counsel's performance, defendant has not shown prejudice. Defendant must show a reasonable probability that, but for his counsel's deficient performance, he would not have been convicted. *Snider*, *supra* at 424. Even if defense counsel had been successful at producing Brittany and Latasha, it is unclear whether their testimony would have been favorable to defendant. According to defense counsel, they would have testified that defendant was not the shooter. However, that testimony would have conflicted with Dixson's testimony that defendant was not at the Lounge when the shooting occurred. In addition, while Dixson testified that defendant was not at the Lounge when the shooting occurred, three witnesses, Cheatom, Wilson, and Turner, testified that defendant was the shooter, and Wilson was positive defendant was the shooter. Further, the trial court, upon hearing the recorded conversations of defendant from jail, stated that defendant sounded like he was "concocting a kind of defense and manipulating that with other persons who might be testifying in this case."[2] Consequently, we hold that defendant has failed to show that but for his counsel's performance, the outcome of his trial would have been different. *Toma*, *supra* at 302-303.

Affirmed.

/s/ Bill Schuette
/s/ Joel P. Hoekstra
/s/ Patrick M. Meter

[2] Defendant contacted Scott and Wilson several times in jail in an attempt to convince them that he was not the shooter.